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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited
liability company,

Plaintiff,

v.

FACEBOOK, INC., et al.,

Defendants.

) Case No. CIV 533328

)
) **Assigned for all purposes to Hon. V.**
) **Raymond Swope, Dept. 23**

) **PLAINTIFF'S RESPONSE TO**
) **DEFENDANTS' NOVEMBER 26, 2018**
) **EX PARTE APPLICATION FOR**
) **SANCTIONS**

)
) Department: 23
) Judge: Honorable V. Raymond Swope
) Filing Date: April 10, 2015
) Trial Date: April 25, 2019

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1 **TABLE OF AUTHORITIES**

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4 *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262 7

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6 *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985)..... 6

1 **INTRODUCTION**

2 Pursuant to the Court’s November 19, 2018 email setting a briefing schedule, Plaintiff
3 Six4Three, LLC (“Plaintiff” or “Six4Three”) respectfully files this opposition to Defendants’ *Ex*
4 *Parte* Application for Sanctions (“*Ex Parte* Application”).

5 **BACKGROUND**

6 On November 2, 2018, a Swedish software developer, Styleform IT (“Styleform”), filed
7 suit against Facebook in California Superior Court, County of San Francisco (“Styleform
8 Complaint”). Declaration of David S. Godkin (“Godkin Dec.”), ¶ 2, Ex. 1. Styleform IT has
9 been a Developer on Facebook Platform continuously from 2007 through present and has
10 developed a number of popular applications in Sweden, including the *Rosa Bandet* (Pink
11 Ribbon) app, which over 250,000 Swedes have used to raise awareness of cancer and support
12 research to find a cure. Godkin Dec., ¶ 2, Ex. 1 (Styleform Complaint, ¶¶ 43, 55-58). The
13 Styleform Complaint names the same seven Defendants as the Fifth Amended Complaint in this
14 action, as well as Facebook Ireland Limited, a 100%-owned subsidiary of Facebook. Godkin
15 Dec., ¶ 2, Ex. 1 (Styleform Complaint, ¶¶ 33-40). Styleform and Six4Three are represented by
16 the same counsel. Godkin Dec., ¶ 2.

17 On November 13, 2018, Plaintiff received a letter from Defendants alleging violations of
18 the Protective Order as regards the Styleform Complaint and demanding that Plaintiff’s counsel
19 withdraw the Styleform Complaint immediately. Godkin Dec., ¶ 4, Ex. 3. On November 15,
20 2018, Plaintiff’s counsel responded to Defendants that all of the allegations in the Styleform
21 Complaint were part of the public record and that Plaintiff’s counsel declined to withdraw the
22 Styleform Complaint. Godkin Dec., ¶ 5, Ex. 4. On November 19, 2018, Plaintiff received the
23 Court’s email and briefing schedule, notifying Plaintiff of Defendants’ *ex parte* application for
24 sanctions. Godkin Dec., ¶ 6, Ex. 5.

ARGUMENT

I. Styleform's Complaint Is Virtually Identical to Plaintiff's Fifth Amended Complaint, Filed January 12, 2018

The Fifth Amended Complaint was filed January 12, 2018, almost a year ago. At no time have Defendants raise any issues regarding potential violations of the Protective Order as regards the Fifth Amended Complaint.

The Styleform Complaint and the Fifth Amended Complaint make substantively identical allegations (i.e. different only wording and not substance) against Defendants concerning the same alleged scheme. Both complaints allege plaintiffs were injured as a result of an alleged scheme by which Defendants induced them to develop applications for the Facebook Platform with false representations concerning the Platform. These included, without limitation, that the platform would operate as a level competitive playing field on which all application developers ("Developers") could build their businesses subject to fair, equal and neutral terms and on which user privacy would be protected. Godkin Dec., ¶¶ 2-3, Exs. 1-2 (Styleform Complaint, ¶¶ 1-5, 70-107; Fifth Amended Complaint, ¶¶ 1-5, 35-78). However, both complaints allege that these representations were false, and were made in order to induce the reliance of Plaintiffs, as well as approximately 40,000 other Developers, on the Facebook Platform, with the plan of leveraging that reliance and offers of secret sweetheart deals to certain chosen Developers to extort from them advertising buys and other benefits that would support Facebook's transition of its advertising business from desktop computers to mobile phones. Godkin Dec., ¶¶ 2-3, Exs. 1-2 (Styleform Complaint, ¶¶ 9-19, 35-40, 61, 65, 115-128, 157; Six4Three's Fifth Amended Complaint, ¶¶ 23-28, 120, 209, 214, 295, 311).

Both complaints allege that at the end of this process, 35,000 of these companies, including Styleform and Six4Three, were effectively shut down by Facebook—the applications that they had built at great expense in reliance on Defendants' representations were rendered broken and useless—to clear the market for new Facebook products and those of Developers with whom Facebook had made secretive, special deals. Defendants publicly justified these actions with a false privacy-centered narrative, which the Defendants referred to as the

1 Switcharoo Plan. Godkin Dec., ¶¶ 2-3, Exs. 1-2 (Styleform Complaint, ¶¶ 25, 26, 157-177; Fifth
2 Amended Complaint, ¶¶ 10, 23, 28, 124-139; Proposed Order Denying Individual Defendants’
3 Special Motion to Strike, filed July 9, 2018, at 11). Both complaints allege that this Switcharoo
4 Plan successfully placed blame on Developers for the repeated privacy scandals resulting from
5 the alleged scheme – and that the very same privacy scandals that have given rise to
6 investigations by government authorities like the U.S. Federal Trade Commission and over a
7 dozen Attorneys General, including the California Attorney General. Both plaintiffs allege they
8 were merely collateral damage in this scheme and Defendants took no action specifically
9 against them as distinct from the other 35,000 companies harmed by the scheme. Godkin Dec.,
10 ¶¶ 2-3, Exs. 1-2 (Styleform Complaint, ¶¶ 28, 52, 195, 210, 314, 317, 318; Fifth Amended
11 Complaint, ¶¶ 12, 179, 183, 185, 202, 226). Further, both plaintiffs allege that, as a result, it
12 became impossible for them to recoup their investment of time, labor and capital into their
13 respective businesses. Godkin Dec., ¶¶ 2-3, Exs. 1-2 (Styleform Complaint, ¶¶ 1-10, 17, 25, 29;
14 Fifth Amended Complaint, ¶¶ 1-10, 26, 62).

15 The specific language of each allegation is identical in substance as is the alleged
16 detailed sequence of events concerning the design and implementation of the alleged scheme.
17 *Compare:* Godkin Dec., Ex. 1 (Styleform Complaint), ¶¶ 1-5, 70-107 *with* Godkin Dec., Ex. 1
18 (Fifth Amended Complaint), ¶¶ 1-5, 35-78; Styleform Complaint, ¶¶ 6-8, 17, 303-307 *with* Fifth
19 Amended Complaint, ¶¶ 85-90, 100, 214, 223, 224; Styleform Complaint, ¶¶ 9-12, 119-130
20 *with* Fifth Amended Complaint, ¶¶ 85, 209-214; Styleform Complaint, ¶ 123 *with* Fifth
21 Amended Complaint, ¶ 85; Styleform Complaint, ¶ 128 *with* Fifth Amended Complaint, ¶ 88;
22 Styleform Complaint, ¶ 18 *with* Fifth Amended Complaint, ¶ 14; Styleform Complaint, ¶ 31
23 *with* Fifth Amended Complaint, ¶ 172; Styleform Complaint, ¶ 25 *with* Fifth Amended
24 Complaint, ¶ 223-24; Styleform Complaint, ¶ 26 *with* Fifth Amended Complaint, ¶ 226.

25 In short, the Styleform Complaint is basically a copy of the Fifth Amended Complaint,
26 no portion of which is under seal. Thus, there is no merit to the allegation that Plaintiffs’
27 counsel misused confidential information from this action to draft the Styleform Complaint.
28 Rather, as any attorney desiring to file a copy-cat action to this one could have, they copied the

1 allegations made in the Fifth Amended Complaint—a public document—to draft the Styleform
2 Complaint. Thus, Defendants’ allegations that Plaintiffs’ counsel based the Styleform
3 Complaint on confidential documents is simply incorrect.

4 **II. All of the Alleged Violations of the Protective Order Rely on Information in the**
5 **Public Domain**

6 Defendants allege that Plaintiff’s counsel “inappropriately drafted the Styleform
7 Complaint that, while mischaracterizing Facebook’s confidential documents, improperly relies
8 on them nonetheless” in “direct violation” of the Protective Order. *Ex Parte* Application, at 6.
9 Not so. Because the Styleform Complaint is substantively a copy of the Fifth Amended
10 Complaint—and the Fifth Amended Complaint is a public document—each allegation that
11 Defendants contend could *only* have come from information subject to the Protective Order, in
12 fact has a public source. Indeed, were it otherwise, Defendants would surely have moved to seal
13 the Fifth Amended Complaint, but never have done so. Thus, Defendants contention that only a
14 party privy to their confidential information could have drafted the Styleform Complaint is
15 incorrect. That party could have done so based on the Fifth Amended Complaint.

16 **A. Alleged Violation #1: Allegations Pertaining to Tinder**

17 Defendants first contend that Styleform’s allegation that “Tinder provided highly
18 valuable unrelated financial consideration, including intellectual property, to Facebook in
19 exchange for its special access to APIs.” *Ex Parte* Application, at 6. Defendants contend that
20 “nothing in the public domain addresses this alleged transfer of intellectual property from
21 Tinder to Facebook as consideration for special access to APIs—because no such transfer ever
22 occurred.” *Id.* This is not so. As alleged in the Fifth Amended Complaint, this comes from *The*
23 *Wall Street Journal*:

24 *The Wall Street Journal* also reported in the same article that Facebook reached
25 an unspecified compromise with dating app Tinder that permitted some form of
26 access to photos of mutual friends. Upon information and belief, Tinder provided
highly valuable unrelated financial consideration to Facebook in exchange for
this special access to data.

27 Godkin Dec., ¶ 3, Ex. 2 (Fifth Amended Complaint, ¶ 167). Indeed, *The Wall Street Journal*’s
28 reporting of Tinder’s special deal with Facebook was published on September 21, 2015, more

1 than three years ago.¹ The 5AC further states that "Developers were required to share their
2 source code and other *confidential intellectual property* with Facebook at Facebook's request"
3 and that "the companies who were offered special, whitelist access to the privatized Graph API
4 Data were ones who either agreed to purchase hundreds of thousands of dollars in unrelated
5 mobile ads, were friends of Zuckerberg, Sandberg or other Facebook executives, or provided
6 other valuable consideration, *such as intellectual property or data*, to Facebook." Godkin Dec.,
7 ¶ 3, Ex. 2 (Fifth Amended Complaint, ¶¶ 6, 167) (emphasis added).

8 **B. Alleged Violation #2: Facebook's Public Relations Firm**

9 Defendants next contend Styleform's allegation that Facebook paid a public relations
10 firm to "disseminate this fraudulent pro-privacy narrative" relies on confidential materials to
11 mischaracterize the PR firm's work for Facebook. Defendants' November 26th *Ex Parte*
12 Application for Expedited Relief, at 7. Again, the Fifth Amended Complaint undermines
13 Defendants' accusation: "Zuckerberg and the Conspiring Facebook Executives directed their
14 public relations team *to feed reporters false information* and in certain cases drafted reporters'
15 stories themselves in order *to disseminate this fabricated narrative* among the public and
16 Developer community." Godkin Dec., ¶ 3, Ex. 2 (Fifth Amended Complaint, ¶ 129) (emphasis
17 added).

18 **C. Alleged Violation #3: Facebook's Public Relations Firm**

19 Defendants also contend that confidential information is the "only possible source" for
20 Styleform's allegation that Facebook executives stopped providing a level competitive playing
21 field for developers in 2009, but concealed this decision from them. Defendants' November 26th
22 *Ex Parte* Application for Expedited Relief, at 7; Godkin Dec., ¶ 2, Ex. 1 (Styleform Complaint ¶
23 7). To conclude that confidential information is the "only possible source" for this allegation
24 ignores numerous allegations in the Fifth Amended Complaint. The complaint alleges
25 repeatedly that Defendants failed to operate "a level competitive playing field" and "made and
26 directed Facebook employees to make false statements and to maliciously suppress material

27
28 ¹ See <https://www.wsj.com/articles/facebook-restrictions-on-user-data-cast-a-long-shadow-1442881332>.

1 facts from at least 2009 through 2015.” Godkin Dec., ¶ 3, Ex. 2 (Fifth Amended Complaint, ¶¶
2 24-27). Further, the Fifth Amended Complaint cites a number of material misrepresentations
3 specifically from 2009 as evidence of this claim. Godkin Dec., ¶ 3, Ex. 2 (Fifth Amended
4 Complaint, ¶¶ 63-64, 102).

5 Moreover, Styleform cites public testimony from the deposition of Ali Partovi in the
6 Six4Three action as evidence of this allegation that Defendants claim can only have been
7 generated from a confidential source. Godkin Dec., ¶ 2, Ex. 1 (Styleform Complaint ¶¶ 95-96).
8 Partovi testifies that “Facebook’s senior executive in charge of Platform told him in a meeting
9 in 2009 that if iLike did not sell to Facebook for a price much lower than its market value at the
10 time, then Facebook would shut iLike down and destroy its business.” *Id.* Partovi’s testimony is
11 quoted at length in the complaint. *Id.* Defendants elected not to move to seal this testimony in
12 the Six4Three action, resulting in the testimony showing up in the Fifth Amended Complaint
13 and then the Styleform Complaint.

14 **III. Styleform Has a Fundamental Interest in Its Choice of Counsel and Defendants**
15 **Seek to Improperly Prevent It from Being Represented Six4Three’s Counsel**

16 All of the allegations in the Styleform Complaint that Defendants claims are violatory
17 also show up in the Fifth Amended Complaint, which, because of its public character, any
18 person could copy and file a copycat version. Thus, Defendants are effectively arguing for a
19 novel *fruit-of-the-poisoned* tree rule, under which a party who produces confidential
20 information in a lawsuit can—virtually indefinitely thereafter—disqualify the attorney
21 representing their adversary in that lawsuit from representing any other party in a similar action
22 in the future. While the potential attractiveness of this rule to the defense bar is obvious, it is not
23 one for which there is any support and, more importantly, it runs directly contrary to the
24 fundamental right of litigants’ to select their own attorney. *Richardson-Merrell, Inc. v. Koller*,
25 472 U.S. 424, 442 (1985) (“Everyone must agree that the litigant’s freedom to choose his own
26 lawyer in a civil case is a fundamental right.”) (*J. Stevens Dissenting*). Accordingly,
27 Defendants’ effort to effect this result here must be denied.

1 **IV. Plaintiff Appreciates the Gravity of Mr. Kramer's Decision to Comply with the**
2 **United Kingdom Parliament's Order, But Plaintiff's Violations Are Not Repeated**
3 **and Malicious, as Defendants Claim, and Thus Do Not Justify Terminating**
4 **Sanctions**

5 As Plaintiff stated in its Limited Response to Defendants' *Ex Parte* Application,
6 Plaintiff fully appreciates Defendants' strong interest in discovering all the facts surrounding the
7 events in the United Kingdom. However, Plaintiff respectfully submits that Defendants
8 mischaracterize Plaintiff's and Plaintiff's counsel's conduct. Defendants' *Ex Parte* Application
9 for an Order to Show Cause refer to a "repeated disregard for this Court's orders" and that
10 Plaintiff "will continue to violate this Court's orders and leak confidential materials to other
11 third parties." *Ex Parte* Application, at 2.

12 As Plaintiff recounted in its November 26 Response to the November 20th Order, Mr.
13 Kramer refused on multiple occasions to comply with the DSMC Orders until he was held in
14 contempt of Parliament and subject to an active investigation by the British government. Upon
15 learning that Mr. Kramer had access to documents designated highly confidential, Plaintiff's
16 counsel took immediate measures to ensure such an incident would not occur, but were too
17 late.² Defendants have provided no evidence supporting their allegations regarding any other
18 potential violations of the Protective Order. Further, as is clear from Sections I and II, *supra*,
19 Defendants' allegation that the Styleform complaint incorporated confidential information is
20 unfounded. This is an extremely serious matter, but the facts support neither Defendants'
21 characterization nor the relief they seek.

22 Terminating sanctions are appropriate when there is a history of abuse and prior
23 monetary or other lesser sanctions have failed to stop a party's conduct; thus, they are
24 appropriate only when no lesser sanction will prohibit future abuse. *See, e.g., Mileikowsky v.*
25 *Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279-280; *Parker v. Wolters Kluwer United*

26 ² As Plaintiffs' counsel will make clear in a separate filing, they in no way encouraged or
27 advised anyone to destroy any evidence. Rather, Plaintiffs' counsel sought only to effect the
28 removal of copies of documents designated as highly confidential by Defendants from locations
to which Mr. Kramer had access. These efforts were initiated prior to Mr. Kramer's disclosure
of those documents and their sole purpose and aim was to cure a just discovered violation of the
Protective Order and eliminate the possibility of the type of improper disclosure that has
brought us to this deeply unfortunate situation.

1 *States, Inc.* (2007) 149 Cal.App.4th 285, 286. This is the first instance in this case in which
2 violations of the Protective Order have been raised regarding the potential release of
3 confidential information. Plaintiff's counsel abided by all of the requirements of the Protective
4 Order upon learning of the events in London for the first time. Plaintiff's principal admits he
5 made a panicked decision while in an impossible position, having been put under investigation
6 by a national government. This is a highly unusual and serious matter, but Plaintiff's conduct
7 has by no means been malicious. Plaintiff would suffer immense prejudice if its case were
8 dismissed due to a decision to comply with the DCMS Order after having made best efforts to
9 comply with the procedures of the Protective Order as set forth in Section 16.

10 **V. Plaintiff Requests that Before Any Award of Sanctions Be Made that It, and Its**
11 **Attorneys Be Given a Full Opportunity to Be Heard**

12 Plaintiff understands that given the events that have occurred, the Court wants and
13 deserves very prompt answers and Defendants need measures, right away, to give them comfort
14 concerning their confidential and highly confidential documents. Plaintiff and its attorneys look
15 forward to providing those prompt answers and working with Defendants to put in place such
16 measures.

17 However, the issue of sanctions is one that Plaintiff and its counsel take very seriously.
18 And the accusations that have been made against Plaintiff's counsel are both extremely serious
19 and have been stated in a way that indicates a fundamental misunderstanding of their
20 involvement in the issues in question, the actions they took, the purpose of those actions, and
21 the results of those actions. Plaintiff and its counsel, thus, respectfully request that the question
22 of sanctions be addressed after Plaintiff and its counsel have had the opportunity answer the
23 Court's questions, address misunderstandings, and provide Defendants the interim comfort they
24 need. Then, if Defendants believe that sanctions are appropriate against certain parties, a noticed
25 motion can be made by them on standard time, which the Court can resolve with benefit of full
26 information and sufficient time to digest and understand the events that gave rise to this
27 situation.

1 Plaintiff respectfully submits that, while certain things can and should be addressed right
2 away—particularly provision to Defendants comfort concerning their confidential and highly
3 confidential documents—the issue of sanctions are properly addressed more orderly and on
4 complete information. Thus, Plaintiff would request that the question of sanctions in regards to
5 the confidential document issue be adjourned at this time.

6 **CONCLUSION**

7 For the foregoing reasons, Plaintiff respectfully requests that: Defendants' request for
8 sanctions regarding the Styleform Complaint be denied; terminating sanctions not be entered
9 against Plaintiff; and the question of sanctions in regards to the confidential document issue be
10 adjourned.

11
12 Dated: November 28, 2018

Respectfully Submitted,

13
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16
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